

IMPACT OF CHANGING THE CONTENT OF THE OECD COMMENTARIES TO THE OECD MODEL CONVENTION ON THE INTERPRETATION OF A DOUBLE TAXATION CONVENTION – BETWEEN INTERPRETIVE DYNAMISM AND UNACCEPTABLE CHANGE*

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Abstract: This article deals with whether the most recent version of the OECD Commentary should be used when interpreting a double taxation convention or the version that was in force at the time the tax treaty was concluded. The author generally prefers the second position. He rejects the dynamic interpretation of the tax treaty because of the risk of violating democratic standards, *inter alia*, the decisive role of the parliament in the process of creating tax law.

Keywords: OECD; double taxation convention; OECD Commentaries

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1. INTRODUCTION

In the practice of interpreting double taxation conventions, the OECD Commentary² undoubtedly plays a key role. However, the content of this instrument is evolving. As a result, it can be helpful when dealing with new emerging problems. These problems sometimes arise from changes in technology rather than the recognition that the previous version of the OECD Commentary is flawed.

While changes to the OECD Commentary are inevitable, they do generate practical problems. The obvious question arises: Which version of the OECD Commentary

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² Strictly formally, the so-called OECD Commentary is part of the *Model Tax Convention on Income and on Capital (MC OECD)*. The publication is available online in English and French: https://www.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-condensed-version_20745419. Its translations into numerous languages are available, including Polish (*Modelowa konwencja w sprawie podatku od dochodu i majątku*, Warsaw: Wolters Kluwer Polska – the last published version is the abridged version of 15 July 2014) and Czech (*Modelová smlouva o zamezení dvojího zdanění příjmů a majetku: stručná verze*, Translated by NERUDOVÁ, D. – ŠIMÁČKOVÁ, K. Prague: Wolters Kluwer ČR, 2009, pp. 431).

should be used? Is it the version from the date of the conclusion of the double taxation convention that matters or the version from the date on which the taxable event occurred. Perhaps the version from the date on which an authority or court decides on the tax treatment of a particular transaction? In theory, the answer to this question should not matter, since neither the double tax convention nor the OECD Model Convention changes. Unfortunately, in practice, a change in the OECD Commentary may result in a change in the tax treatment of a particular type of transaction. This means that determining the version of the OECD Commentary relevant to the interpretation of the double tax convention is important to the taxpayer. However, this problem has more than a purely practical dimension. It can be seen in the context of the tax law sources – Can the OECD Commentary change tax law?

The title problem should be analysed not only based on the views of tax law doctrine. It is also necessary to consider it in the context of the constitutional standards of democratic states. Therefore, it is important to analyse the case law of tax courts.

2. LEGAL STATUS OF THE OECD COMMENTARY

The status of the OECD Commentary is a contentious issue in doctrine and case law in many countries.³ The OECD recommends the use of the OECD Commentary in the application and interpretation of double taxation conventions⁴ based on MC OECD.⁵ There is no doubt in the doctrine of public international law that recommendations are acts that do not have a binding character.⁶ This does not necessarily imply a complete disregard of the significance of the OECD Commentary, as a “soft commitment” of a state to a certain behaviour can be derived from a recommendation. The basis for its derivation is usually sought in general principles of international law, such as those of good faith or effectiveness.⁷ Some authors have gone further and indicated that non-compliance with a recommendation constitutes an example of *abuse of right*.⁸

The basis for the application of the OECD Commentary is usually sought in the rules on the interpretation of international agreements, which are currently codified

³ See the classic collection of studies on this topic: DOUMA, S. – ENGELEN, F. (eds.). *The Legal Status of the OECD Commentaries*. Amsterdam: IBFD, 2008; or ERASMUS-KOEN, M. – KOEN, F. – DOUMA, S. *Legal Status of the OECD Commentaries – In Search of the Holy Grail of International Law. Bulletin for International Taxation*. 2007, Vol. 61, No. 8, pp. 339–352.

⁴ Next: DTC.

⁵ OECD. Appendix: Recommendation of the OECD Council concerning the Model Tax Convention on Income and Capital. In: *Model Tax Convention (Full version)* [online]. Paris: OECD Publishing, 2019 [cit. 2022-08-20]. Available at: <https://doi.org/10.1787/8027dfcc-en>.

⁶ BLOKKER, N. *Skating on Thin Ice?: on the Law of International Organizations and the Legal Nature of the Commentaries on the OECD Model Tax Convention*. In: DOUMA, S. – ENGELEN, F. (eds.). *The Legal Status of the OECD Commentaries*. Amsterdam: IBFD, 2008, p. 18.

⁷ PROKISCH, R. in: VOGEL, K. *Klaus Vogel on Double Taxation Conventions*. London: Kluwer Law International, 1997, pp. 44–45; MALICKA, M. – ZALASINSKI, A. *The Role of the Official Commentary on the OECD Model Convention in the Interpretation of Double Taxation Conventions Based on the Model. Tax Law Quarterly*. 2005, No. 4, p. 99.

⁸ ENGELEN, F. *Some Observations on the Legal Status of the Commentaries of the OECD Model. Bulletin for International Taxation*. 2007, No. 8, p. 106.

in the Vienna Convention on the Law of Treaties.⁹ However, there is no consensus as to which provision forms this basis. One can encounter, *inter alia*, the view that the OECD Commentary is a clarification of the ordinary sense of words referred to in Article 31(1) of VCLT.¹⁰ This concept is based on a specific approach to understanding the concept of “ordinary meaning”, which is supposed to break away from what we understand as “ordinary meaning”. Ordinary meaning would have to be equated with specialised meaning. In contrast, some authors have sought a basis for referring to the OECD Commentary in Article 31(4) of VCLT.¹¹ Another approach is to treat the OECD Commentary as “context” within the meaning of Article 31(2) VCLT.¹²

One can also encounter the view that the OECD Commentary constitutes a supplementary means of interpretation within the meaning of Article 32 of VCLT. The Commentary would constitute a type of preparatory work that has either been prepared by the parties to the treaty or at least is well known to them.¹³ However, such a qualification would significantly diminish the role of the OECD Commentary, as it would only be used when other means fail.¹⁴

It is possible to encounter views that detract somewhat from the search for the specific provision of VCLT that the OECD Commentary was intended to invoke and return to certain principles of legal reasoning, such as the principles of *estoppel* or *acquiescence* and the principle of protecting legitimate expectations. According to the Anglo-Saxon principle of *estoppel*, if one has adopted a certain practice of action that others have accepted, the former cannot then demand a change in that practice on the grounds that it is illegal. The principle of *acquiescence* is the concept of tacit *acquiescence*; that is, when one entity makes a certain position or claim to another entity and the latter does

⁹ In Poland published in: *Journal of Laws*. 1990, No. 74, item 439 – cited further as “Vienna Convention” or “VCLT”. English version available at: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

¹⁰ PROKISCH, *c. d.*, p. 44; REIMER, E. Tax Treaty Interpretation in Germany. In: LANG, M. (ed.). *Tax Treaty Interpretation*. The Hague – London – Boston, Wien: Kluwer Law International, Linde Verlag, 2001, p. 135.

¹¹ “A special meaning shall be given to a term if it is established that the parties so intended”, see AVERY JONES, J. The Binding Nature of the OECD Commentaries from the UK Point of View. In: DOUMA, S. – ENGELLEN, F. (eds.). *The Legal Status of the OECD Commentaries*. Amsterdam: IBDF, 2008, p. 161.

¹² HELMINEN, M. Tax Treaty Interpretation in Finland. In: LANG, M. (ed.). *Tax Treaty Interpretation*. The Hague – London – Boston, Wien: Kluwer Law International, Linde Verlag, 2001, p. 83; BIZIOLI, G. Tax Treaty Interpretation in Italy. In: LANG, M. (ed.). *Tax Treaty Interpretation*. The Hague – London – Boston, Wien: Kluwer Law International, Linde Verlag, 2001, pp. 217–219; SOLER ROCH, M. T. – RIBES RIBES, A. Tax Treaty Interpretation in Spain. In: LANG, M. (ed.). *Tax Treaty Interpretation*. The Hague – London – Boston, Wien: Kluwer Law International, Linde Verlag, 2001, pp. 309–311; MORAWSKI, W. Metody wykładni umów o unikaniu podwójnego opodatkowania – znaczenie Modelu Konwencji OECD i Modelu Konwencji ONZ. *Przegląd Podatkowy*. 2011, No. 7, p. 56.

¹³ VOGEL, K. – PROKISCH, R. General Report. In: *Cahiers de Droit Fiscal International. Studies on International Fiscal Law by the IFA. Vol. LXXVIIIa: Interpretation of Double Taxation Conventions*. The Hague: Kluwer Law and Taxation Publishers, 1993, p. 74; DÖRR, O. – SCHMALENBACH, K. (eds.). *Vienna Convention on the Law of Treaties: a Commentary*. 2nd ed. Berlin: Springer, 2018, pp. 621–623.

¹⁴ VOGEL, K. The Influence of the OECD Commentaries on Treaty Interpretation. *Bulletin for International Fiscal Documentation*. 2000, No. 12, p. 615. Meanwhile, in practice, reaching for the OECD Commentary is the beginning, not the end, of treaty interpretation.

not object within a reasonable time, tacit acceptance of the first entity's proposal is presumed.¹⁵

Polish courts,¹⁶ as well as courts in many other countries,¹⁷ are rather cautious in their opinions on the issue under analysis, limiting themselves to stating that the OECD Commentary is not a source of law but might be helpful in interpreting double taxation conventions. The Czech courts, however, boldly express the view that the OECD Commentary is a complementary means of interpretation.¹⁸

It is difficult to identify a strong reason for assuming that the OECD Commentary is binding.¹⁹ It is a useful means of interpretation but not a source of law. To regard it as a binding document would be unacceptable from the viewpoint of the constitutional standards of most democratic countries in the world. This is because law (especially tax law) is usually created by the parliament. The parliament also influences the conclusion of international conventions.²⁰ Meanwhile, the OECD Commentary is the result of the work of the OECD, in which representatives of the governments of the member states are active. "The clerical factor" cannot, therefore, determine the *de facto* creation of tax law instead of the parliament.²¹

The issue of the effect of the OECD Commentary's amendment on the practice of interpreting double taxation conventions must be seen primarily in the context of the issue of the legal value of the OECD Commentary. The resolution of whether the OECD Commentary has a binding character is expected to impact the perception of the issue of the effect of the OECD Commentary's amendment. The binding nature of the OECD Commentary makes it similar to a classical source of law. This would entail the adoption of classical principles of law application, such as the prohibition of retroactivity.

Accepting that we are dealing with a change in the interpretation of the law opens the door to a discussion of its implications.

3. AMENDING THE COMMENTARY – CHANGING AN INTERPRETATIVE VIEW OR MAKING LAW?

The OECD Commentary is formally interpretative in nature. It thus constitutes "only" a clarification of the content of the model international agreement. It is a feature of interpretative acts that they do not create "novelty" but merely clarify the content of unclear provisions. Contrary to appearance, the boundary between interpre-

¹⁵ ENGELEN, *c. d.*, p. 106 et seq.

¹⁶ See, for example, judgment of the Supreme Administrative Court of 9 July 2019, II FSK 2852/17; and judgment of the Supreme Administrative Court of 12 March 2015, II FSK 185/13.

¹⁷ See in more detail in MAISTO, G. (ed.). *Court and Tax treaty Law*. Amsterdam: IBFD, 2007.

¹⁸ Judgment of the Supreme Administrative Court of 25 April 2019, 2 Afs 103/2018-46; and judgment of the Supreme Administrative Court of 10 February 2004, 2 Afs 108/2004-106.

¹⁹ It is worth noting views that accept the binding nature of the OECD Commentary only in certain situations, GARBARINO, C. *Judicial Interpretation of Tax Treaties: the Use of the OECD Commentary*. Cheltenham: Edward Elgar Publishing, 2016, pp. 24–26.

²⁰ In Poland, for example, tax treaties are ratified by the President with the consent of the parliament.

²¹ MORAWSKI, W. *Interpretacje prawa podatkowego i celnego – stabilność i zmiana*. Warsaw: Wolters Kluwer Polska, 2012, pp. 115–119.

ting the law and creating it is quite unclear in practice, especially when the law being interpreted is unclear. The interpretative act is applied when the content of the legal provision itself does not resolve the legal problem. In essence, then, in such a case, the interpretation must, in a sense, “create” a solution that does not follow directly from the content of the law.

In the case of the OECD Commentary, we are unfortunately often dealing with *de facto* law-making under the guise of interpretation. It is not law-making when the regulation is unclear. The authors of the OECD Commentary are creating new institutions that are not known to the Model Convention.

One example of this practice by the authors of the OECD Commentary is the problem of international hiring-out of labour. Under a linguistic interpretation of Article 15 of the Model OECD Convention, if an employee who is a tax resident of country X is employed by a resident of the same country, but under an agreement between that employer and an entrepreneur who is a resident of country Y, the employee performs work for the entrepreneur in country Y then (as long as his or her stay is short-term, i.e. up to 183 days) and the remuneration is paid by the employer from country X, such income will be taxable only in the employee’s country of residence. Normally, under the national laws of countries X and Y, the employer will be a resident of country X and not the actual beneficiary of the work of the company from country Y.

This can, however, lead to undesirable consequences of abusing DTC if, for the sole purpose of reducing the tax liability, a subsidiary is created in a country with a favourable labour income tax regime and this subsidiary employs workers who are hired to a third party located in a high-tax country.²² It does not always have to be about tax optimisation.

To prevent such situations, in 1992, building on the 1984 OECD report *Taxation issues relating to international hiring-out of labour*, the commentary to Article 15 of the OECD MC was amended to introduce the institution of an employer in the *economic* sense (*economic employer*), which would be an entity that uses the work provided by the employee and bears the risk for its results.²³ It was explicitly stipulated that the departure from the concept of employer in the legal sense was only possible in the event of finding abuse of DTC. In 2010, further criteria for considering an employer to be a *de facto* employer were added, but more significantly, the condition of abuse of the right disappeared from the text of the new version. As it stands, the OECD Commentary allows the economic employer concept to be applied at all times and not only when there is an abuse of the right. One has to agree with the view that such a modification of the OECD Commentary should not be accepted in light of the principles of interpretation of DTC.²⁴

²² WILK, M. Międzynarodowy wynajem siły roboczej a zjawisko nadużycia umów o unikaniu podwójnego opodatkowania. *Przegląd Podatkowy*. 2014, No. 6, pp. 34–40.

²³ Paragraph 8 of the Commentary to Article 15 of the OECD MC proposes specific criteria to verify whether the case facts indicate that an entity other than the strictly formal ties of labour law should be considered the employer.

²⁴ WILK, *c. d.*, p. 38; DE BROE, L. L’usage du commentaire OECD et autres instrument extrinsèques pour l’interprétation des conventions de double imposition belges. In: TRAVERSA, E. – DECKERS, V. *Liber*

This example shows the importance of using different versions of the OECD Commentary. Counter-intuitively, it is not just reaching for a newer, more complete version of the OECD Commentary that states the same thing, but in a slightly better, clearer way. A new version of the OECD Commentary might sometimes contain completely different views from the older one.

4. DYNAMIC OR STATIC INTERPRETATION OF TAX TREATIES

The issue of the effect of the OECD Commentary's revision on the practice of interpreting double taxation conventions must be seen in the context of the broader issue of the static or dynamic interpretation of double taxation conventions.

The problem of the static and dynamic nature of DTC interpretation has several aspects that arise from the possibility that several "contexts" of DTC interpretation might change. The MC OECD might change first the MC OECD, second, the national law to which Article 3(2) of the MC OECD refers and third, the OECD Commentary. A related issue is the amendment, or submission at all, by OECD member states of comments to the OECD Commentary and reservations to the MC OECD.²⁵ In the case of each of the above issues, the "basic" set of arguments in favour of a dynamic or static interpretation of the law is quite similar, which does not mean that there are no differences.

5. POSITION OF THE OECD COMMENTARY

In general, the wording of the OECD Commentary speaks in favour of a dynamic interpretation of tax conventions in the context of a reference to a situation of change in its content. In the course of drafting the 1977 OECD MC, it was accepted that the (bilateral) conventions concluded should be interpreted, as far as possible, in the spirit of the revised Commentary, even though the provisions of these conventions do not yet have the precise terminology used by the 1977 Model Convention. The differences between the 1963 MC OECD and the 1977 MC OECD were greater than the subsequent, incremental changes made to the 1977 MC. Moreover, after 1977, there was no formal development of a new model convention. It might not be surprising, therefore, that the OECD Commentary recommended a similar approach to changes made in the OECD Commentary after 1977.²⁶

Underlying this reasoning is the assumption that the amendments to the OECD Commentary "*reflect the consensus of the OECD member countries as the proper interpretation of existing provisions and their application to specific situation*".²⁷ In essence,

Amicorum Jacques Autenne: promenades sous les portiques de la fiscalité. Bruxelles: Bruylant, 2010, p. 468.

²⁵ I omit this aspect of the problem, more extensively on this: MAISTO, G. The Observations on the OECD Commentaries in the Interpretation of Tax Treaties. *Bulletin for International Fiscal Documentation*. 2005, Vol. 59, No. 1, pp. 14–19.

²⁶ OECD Commentary, paragraph 34 of the Introduction.

²⁷ *Ibid.*, paragraph 35 of the Introduction.

therefore, the amendments to the OECD Commentary would not be substantive but merely clarify the content of the MC OECD more clearly. The belief of the members of the OECD Committee on Fiscal Affairs that they are (like the Pope in matters of faith) infallible is somewhat surprising. In this context, another thesis of the OECD Commentary is logical: that it is not permissible to apply *an* interpretation *a contrario in such a way* that from the fact that the content of the OECD Commentary has changed, the conclusion is drawn that the earlier wording of the OECD Commentary had a different meaning.²⁸

The above principles are reflected in the Recommendation of the OECD Council of 23 October 1997 annexed to the 1998 MC OECD. According to paragraph I.3. of the Recommendation, member authorities should follow the “*commentaries to the articles of the Model Convention, as amended from time to time*”.

6. DYNAMIC INTERPRETATION OF INTERNATIONAL CONVENTIONS – ADVANTAGES

The dynamic interpretation of international conventions (including tax treaties in particular) has many advantages.

The economic relationships to which tax treaties relate are dynamic, and the legal environment is changing. Changing legal environments and economic contexts mean that a treaty interpreted statically might, over time, no longer meet the current needs.²⁹ For example, the old DTCs in respect of royalties refer to “*tapes for radio and television*”, which, in the 21st century, might cause puzzlement and perhaps lack of understanding of the problem in younger lawyers and memories of youth in older ones (like the author of this paper). In this context, there is rather little doubt that such formulations, both in DTC and (hypothetically) in any interpretative act, need to be approached dynamically and adapt the “old text” to current technological standards.

In addition, as most double taxation conventions have identical – from a linguistic viewpoint – content, they should have the same “real” meaning.³⁰ If one were to apply a static interpretation of the conventions, they would have different meanings depending on when they were concluded, because the interpretative context, including the OECD Commentary, is varying.

The dynamic interpretation of DTC unifies their interpretation (unless there is a case of divergence in the content of the treaty), which is important for those applying the treaties. A taxpayer with business relationships with a significant number of counterparties, owing to the dynamic approach to treaty interpretation, does not need to refer to different versions of the OECD Commentary depending on the timing of the treaty.

²⁸ OECD Commentary, paragraph 36 of the Introduction.

²⁹ SHARKEY, N. C. China’s Tax Treaties and Beneficial Ownership: Innovative Control of Treaty Shopping or Inferior Law-Making Damaging to International Law? *Bulletin for International Taxation*. 2011, Vol. 65, No. 12, p. 658.

³⁰ WATTEL, P. J. – MARRES, O. The Legal Status of the OECD Commentary and Static or Ambulatory Interpretation of Tax Treaties. *European Taxation*. 2003, Vol. 43, No. 7, p. 223.

It cannot be ignored (especially in the post-BEPS era) that successive versions of the OECD Commentary have made it increasingly difficult to use DTC for tax avoidance. This approach to increase the efficiency of the tax system can already be considered the consensus of tax administrations. Dynamic treaty interpretation facilitates this objective.

The problem is whether these practical arguments have a legal basis.

7. AMENDMENT TO THE OECD COMMENTARY IN THE CONTEXT OF VCLT

Not all views contained in the OECD Commentary have been accepted in the international tax law literature. This was expressed rather colourfully by M. Ellis: *“it seems to me that the OECD Fiscal Committee and the Commentary making should a statement that new versions of the Model and new versions of the Commentary should be used as proper means of interpretation of the older treaties remind me of Baron Münchhausen pulling himself out of a morass by his own hair. I find it very surprising that such a group of – be it authoritative – people can determine how authoritative they themselves shall be, and I do think, therefore, that I a very significant statement.”*³¹ Similarly, in favour of a static interpretation were P. J. Wattel and O. Marres, considering it as a rule, however, exceptionally allowing reference to a version of the OECD Commentary later than the agreement but as a complementary means of interpretation.³²

The main problem highlighted in the international tax law literature is that the OECD Commentary later than the time of the agreement does not reflect the intention of the parties to the agreement.³³

Prima facie some “hope” can be drawn from the wording of Article 31(3)(a) of VCLT, which indicates that, together with the context, *“any subsequent agreement between the parties concerning the interpretation of the treaty or the application of its provisions”* is to be taken into account. The provision speaks of an agreement “subsequent” to the treaty. If the OECD Commentary in its pre-treaty version were to be assessed in the context of this provision, then this provision would not apply to the OECD Commentary. In the case of the later version, the same passage in the provision of Article 31(3)(a) of VCLT would seem to support its application to the OECD Commentary. However, a closer examination of the problem reveals significant doubts regarding the correctness of such reasoning. It is important to note some technical issues related to the amendments to the OECD Commentary. The provision of Article 31(3)(a) of VCLT speaks of an agreement, and it is about the agreement as a whole. Meanwhile, amendments to the OECD Commentary do not currently take the form of drafting a new version of the Commentary (as they did before 1977) but only involve making partial amendments. Thus, the OECD Council does not adopt a new OECD Commentary, and

³¹ ELLIS, M. The Influence of the OECD Commentaries on Treaty Interpretation: Respons to Prof. Dr. Klaus Vogel. *IBFD Bulletin*. 2000, No. 12, p. 618.

³² WATTEL – MARRES, *c. d.*, p. 235. Similarly, against dynamic interpretation: BECERRA, J. A. *Interpretation and Application of Tax Treaties in North America*. Amsterdam: IBFD, 2007, p. 75.

³³ VOGEL, *c. d.*, p. 615; LANG, M. – BRUGGER, F. The Role of the OECD Commentary in Tax Treaty Interpretation. *Australian Tax Forum*. 2008, No. 23, p. 102.

this “subsequent agreement” (if one were to use the terminology of Article 31(3)(a) of VCLT) would include only sections of the OECD Commentary currently in force. Of course, this problem can be circumvented by assuming that the OECD Council’s approval of amendments to the OECD Commentary has the effect of “confirming” the content of the entire OECD Commentary.

There is also a problem with the rationality of this reasoning. It follows that a later version of a document existing at the time of the conclusion of the treaty would have more weight in the interpretation of the treaty than the version existing at the time of its conclusion. Since the parties entered into the treaty in the “context” of an OECD Commentary with a specific content, giving primacy to the later version would lead to the conclusion that there is a change in the meaning of the treaty. If we add to this the fact that this would occur through an agreement that is not subjected to ratification in the usual manner for double taxation treaties, but is instead the result of an agreement made by representatives of the executive, such a concept would be difficult to defend in light of the constitutional principles of probably most European states. After all, the parliament would be completely deprived of any influence on the evolution of the content of the agreement.

If one were to refer to the content of the OECD Commentary in the wording in force at the time of the convention’s conclusion, it would at least be possible to assume that a “rational legislator”, when giving – in the Polish constitutional realities – consent to the ratification of the convention by the President of the Republic of Poland accepts at the same time its content interpreted in light of the OECD Commentary.³⁴ As indicated by M. Lang and F. Brugger, an argument against the possibility of referring to the subsequent OECD Commentary on the basis of Article 31(3)(a) of VCLT is that the OECD Commentary is in no way binding.³⁵

One can also try to treat the amendments of the OECD Commentary as a subsequent practice of application of DTC within the meaning of Article 31(3)(b) VCLT. However, the practice of applying the tax treaty is at a rather low level (i.e., that of the tax authorities).³⁶ Thus, it would have to be proven that the field administrations of both DTC countries act identically, as stated in the modified OECD Commentary. However, the application of Article 31(3)(b) of VCLT raises major constitutional questions, not only in Poland. After all, it means that the will of the tax administration will change the earlier decision of the parliament, which did not give its consent to the ratification of an international agreement in the context of the old version of the OECD Commentary.

It is necessary to distinguish between the subsequent practice of an interpretative character falling under Article 31(3)(b) VCLT and the subsequent practice which modi-

³⁴ There can be considerable doubt regarding the state of awareness of the “actual” legislature (i.e., members of parliament) of the existence of the OECD Commentary and whether the existence of such implicit parliamentary acceptance of the content of the OECD Commentary can be assumed.

³⁵ LANG – BRUGGER, *c. d.*, pp. 104–105.

³⁶ *Ibid.*, p. 103.

fies the underlying treaty.³⁷ It is rightly pointed out that when an interpreter goes beyond the content of the treaty, they mean modifying it and not interpreting it.³⁸

8. APPLICATION OF THE NEW VERSION OF THE OECD COMMENTARY IN THE CONTEXT OF DEMOCRATIC PRINCIPLES OF THE SEPARATION OF POWERS

A static interpretation is supported by the principles of legal certainty and *pacta sunt servanda*.³⁹ Subsequent changes in the “context”⁴⁰ should not be taken into account when interpreting the convention, as they could not have been taken into account during the ratification procedure, especially at the parliamentary stage. The static interpretation therefore has a strong basis in the constitutional context. This is because it guarantees that the parliament has a real influence on shaping the taxpayer’s legal and tax situations. Attention to parliamentary control of the process of shaping the taxpayer’s legal situation is an argument commonly raised in the literature in many countries.⁴¹

Considering subsequent changes to the broader context has no “democratic legitimacy”.⁴² Amendments to the OECD Commentary are adopted by the OECD Committee on Fiscal Affairs, which is a body composed of persons delegated by the Ministers of Finance of OECD member countries.

There are some practical problems associated with the fact that a tax treaty is sometimes negotiated over a period of years. During negotiations, the OECD Commentary might change. The problem then arises as to which version of the Commentary to use. This circumstance would be an argument in favour of a dynamic interpretation of the agreement and refer to the version of the OECD Commentary at the time of DTC application.⁴³ However, this is a rather weak argument. The moment of ratification of a tax treaty, as the moment when it enters the legal order, should be taken as the decisive moment for the application of the Commentary.

Static interpretation also has the value of stabilising the taxpayer’s legal position. By strictly relying on the legal text of the treaty and on the circumstances existing at the time of the conclusion of that treaty, the taxpayer can gain certainty about their future tax law obligations. In doing so, a dynamic interpretation of a treaty might result in

³⁷ Ibid., p. 104.

³⁸ Ibid., p. 104; LANG, M. How Significant Are the Amendments of the OECD Commentary Adopted After the Conclusion of a Tax Treaty? *Diritto e Pratica Tributaria Internazionale*. 2002, No. 1, p. 7.

³⁹ WATTEL – MARRES, *c. d.*, p. 222.

⁴⁰ It is not strictly a question of context in the sense of Article 31 of the Vienna Convention but of the entire legal “environment” of the double taxation treaty, which in some way influences its interpretation and thus also the content of domestic law.

⁴¹ LANG, *How Significant Are the Amendments of the OECD Commentary Adopted After the Conclusion of a Tax Treaty?*, p. 9. In Belgium, reference is made to the principle of legalism contained in Article 170 of the Constitution of the Kingdom of Belgium – see DE BROE, *c. d.*, p. 468.

⁴² WATTEL – MARRES, *c. d.*, p. 222; DE BROE, *c. d.*, pp. 467–468.

⁴³ STEENKAMP, L.-A. The Use of the Model Tax Convention as an Interpretative Aid: the Static vs Ambulatory Approach Debate Considered from a South African Perspective. *Journal of Economic and Financial Sciences*. 2017, Vol. 10, No. 2, p. 200.

a taxpayer being taxed differently at different times under unchanged factual circumstances.⁴⁴

9. PROTECTION OF THE TAXPAYER'S INTERESTS IN THE CONTEXT OF REVISION OF THE OECD COMMENTARY

It is also worth looking at this problem from the viewpoint of the taxpayer's interests. Such an approach is virtually ignored in the discussion of this problem.

Since the new version of the OECD Commentary is – in theory – clearer, the taxpayer should be interested in applying it. However, in practice, the OECD Commentary deviates increasingly from the content of the MC OECD over time in the interest of the tax administration. It is difficult to build a solution to the title problem on the basis of the criterion of benefit for one of the parties to the legal relationship.

It is better to look at the issue from the viewpoint of stability of the taxpayer's legal position. The following sequence of events might occur: 1) the conclusion of a double taxation convention, 2) the generation of income to which the treaty applies and the payment of tax, 3) the amendment of the OECD Commentary and 4) the adjudication of the consequences of realisation of the tax event. When this situation occurs, the taxpayer is taken by surprise by the change in the content of the OECD Commentary and their situation is destabilised. They could not have taken the future content of the OECD Commentary into account at the time of the tax calculation. Thus, if we are discussing the dynamics of interpretation, it is certainly unacceptable for a tax authority to rely on a version of the Commentary issued after the taxable event has occurred. The taxpayer acts within a legal reality (also defined by the OECD Commentary) and cannot be surprised by a change in the way the law is interpreted.

10. OLD OR NEW VERSION OF THE OECD COMMENTARY – THE “SOFT” APPROACH

The unambiguous approach of the OECD Committee on Fiscal Affairs, which prescribes the application of the new version of the OECD Commentary, is difficult to be accepted in light of constitutional standards as well as the Vienna Convention on the Law of Treaties. This would mean placing the full power of international taxation in the hands of *de facto* officials of member states' ministries of finance, beyond any parliamentary control. A dynamic interpretation of DTC in the context of an amendment to the OECD Commentary is unacceptable, particularly because amendments to the OECD Commentary are made too freely in isolation from the content of the OECD Model Convention.

⁴⁴ WATTEL – MARRES, *c. d.*, pp. 222–223.

However, the OECD Commentary, not being binding material, cannot have the effect of forcing a change in the way a tax treaty is interpreted. In fact, an administrative court can refuse to apply the view contained in the OECD Commentary when it contradicts DTC content. This is because a judge in Poland (as in most democratic countries) is subject to legislation passed by the parliament and not to the views of ministerial officials, even when they are acting within the OECD framework. As the court is not bound by the content of the OECD commentary, the taxpayer might also try to challenge it in the course of a dispute with the tax authority. In addition, the tax authority might also refuse to apply the Commentary, for example, if it finds the case law of the courts more convincing. In this context, there is no “hard” ruling on which version of the OECD Commentary to apply.

However, can any criterion be identified which should guide the interpreter, when they would have to choose between relying on the new or old content of the OECD Commentary, and at the same time considering that there are no other arguments which would strongly prevail in favour of accepting one of its versions? Thus, it is a situation in which the linguistic interpretation of a tax treaty fails because it is either laconic or ambiguous, while other methods of interpretation do not provide strong arguments, and the OECD Commentary becomes virtually the only interpretative material that provides guidance to resolve the issue at hand.

The consequence of the above considerations must be that the version of the OECD Commentary on the date of the tax treaty should generally be preferred.

There are more or less controversial exceptions to the rule that a new version of the OECD Commentary should be referred to. A rather interesting case⁴⁵ might be the judgement of the Federal Court of Australia in the case of *Lamesa Holdings BV*.⁴⁶ The court – relying, *inter alia*, on the opinion of Prof. M. Ellis (an advocate for referring to the OECD Commentary in the version current at the date of the agreement) – held that the 1976 Australia–Netherlands convention could be interpreted on the basis of the 1977 version of the OECD Commentary. At the same time, the entire MC OECD, together with the OECD Commentary, applies only to agreements concluded thereafter. These two statements seem contradictory. However, the court took into account several specific circumstances, including the fact that the 1977 MC OECD had already been published earlier (in 1974) and was known in draft form at the time of the Dutch–Australian convention. It is difficult to accept this argument. Before the MC OECD of 1977 was officially published, it was only a proposal which did not necessarily have to become an official document. Thus, when concluding the agreement in 1976, and when negotiating it even earlier, the States Parties to the Agreement did not have to take into account the new, still draft version of the OECD Commentary, as they were not sure that it would become the official version. These comments should be regarded as having been made “with reservation”. I am not familiar with the negotiation process of this convention,

⁴⁵ Analysed in the literature, see LANG – BRUGGER, *c. d.*, p. 107; LANG, M. Later Commentaries of the OECD Committee on Fiscal Affairs, Not to Affect the Interpretation of Previously Concluded Tax Treaties. *Intertax*. 1997, Vol. 25, No. 1, p. 8.

⁴⁶ *Lamesa Holdings BV v Commissioner of Taxation* [1997] FCA 134 (4 March 1997). In: *Federal Court of Australia* [online]. 1997 [cit. 2022-07-10]. Available at: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/cth/FCA/1997/134.html?stem=0&synonyms=0&query=lamesa>.

and it cannot be ruled out that there was a just cause to refer to the 1977 version of the OECD Commentary. It all depends on the context of the negotiations and how the publication process of the 1977 MC OECD proceeded.

However, the *Lamesa Holdings BV* case must also be viewed from the viewpoint that there were (or at least that was the assumption made by the Australian court) no significant differences between the 1977 MC OECD and 1963 MC OECD. To the extent relevant to the resolution of the dispute, there were (or at least this was the assumption made by the Australian court) no significant differences. The use of the new MC OECD in this situation might have been convenient, even from a practical viewpoint, and is not material. Nevertheless, this position of the court leads to some confusion from a logical viewpoint. The court's argumentation would have been more coherent, however, if it had relied on the text of the 1963 OECD Commentary, while pointing out that this view is also valid under the 1977 OECD Commentary.

Reference to the new OECD Commentary might also be appropriate where the previous version is silent on an issue of interest to the interpreter. This is particularly justified if at the time the old version of the OECD Commentary was formulated, the issue in question did not exist or was not of sufficient intensity to have attracted the interest of doctrine or practice and was therefore omitted from the work of the OECD Committee on Fiscal Affairs. A good example of this is the issue of new telecommunications technologies and the related tax aspects of e-commerce. A double taxation treaty concluded in the "pre-Internet" era must also be applicable today. If its content can be "read" such that it is adapted to new circumstances, the same should be allowed for the possibility of referring to more recent versions of the OECD Commentary. After all, this is not a change in the OECD's position but its formulation in relation to a given new social, technological or legal phenomenon.

11. CONCLUSION: IS THERE A SETTLEMENT?

The dispute over the dynamic or static nature of the interpretation of DTC in the context of the revision of the OECD Commentary is far from settled. The position of the Committee on Fiscal Affairs is contested in the doctrine.⁴⁷ In many countries, the jurisprudential practice is variable. In Germany, for example, the dynamic approach prevailed in older judgements; later courts tended to refer to the version of the OECD Commentary on the date of DTC.⁴⁸ In the Canadian Federal Court of Appeal's judgement of 15 October 1998 in *Cudd Pressure Control Inc v. The Queen*,⁴⁹ it was held that

⁴⁷ THURONYI, V. – BROOKS, K. – KOLOZS, B. *Comparative Tax Law*. Alphen aan den Rijn: Kluwer Law International, 2016, p. 102.

⁴⁸ HEBER, C. – STERNBERG, CH. Legal Interpretation of Tax Law: Germany. In: VAN BRADERODE, R. F. – KREVER, R. (eds.). *Legal Interpretation of Tax Law*. Alphen aan den Rijn: Kluwer Law International, 2014, p. 186.

⁴⁹ *Cudd Pressure Control Inc. v. Canada, A-369-95*. In: *Federal Court of Appeal Decisions* [online]. 1997 [cit. 2022-07-10]. Available at: http://decisions.fca-caf.gc.ca/en/1998/a-369-95_6778/a-369-95.html; MORAWSKI, W. Dopuszczalność odwoływania się przy wykładni umowy o unikaniu podwójnego opodatkowania do Komentarza OECD późniejszego niż interpretowana umowa. Wyrok Federal Court

the later OECD Commentary had some relevance when interpreting an earlier convention. The case in question was the 1942 US convention. This position was upheld by the Tax Court of Canada in its judgement of 7 December 1999⁵⁰ in *Gordon Sumner v. The Queen*⁵¹ also in relation to the US convention. In contrast, in the judgements of Austrian courts, one can find statements that the content of the OECD Commentary in force at the time of the conclusion of the convention should be relied upon.⁵² The same views can be found in the opinions of the French Commissaire du gouvernement.⁵³ In addition, the Spanish court in the *Oracle* judgement saw nothing wrong in referring to the OECD Commentary in a wording more recent than the date of the treaty.⁵⁴ Czech courts pay attention to which version of the OECD Commentary is referred to by the taxpayer and the tax authority.⁵⁵

Unfortunately, there is no clear solution on the horizon.

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of Appeal (Kanada) z dnia 15 października 1998 r. w sprawie Cudd Pressure Control Inc v. The Queen FCA-369-95. *Przegląd Podatkowy*. 2011, No. 8.

⁵⁰ Sumner v. The Queen, 98-1222-IT-G, 98-1410-IT-G. In: Tax Court of Canada Judgments [online]. 1999 [cit. 2022-07-10]. Available at: <http://decision.tcc-cci.gc.ca/en/1999/1999tcc981222/1999tcc981222.html>.

⁵¹ Paragraph 37 of the judgement states laconically that the position of the tax authorities is supported by the content of the OECD Commentary.

⁵² Judgment of the Supreme Administrative Court of 31 July 1996, 92/13/0172, quoted by METZLER, V. E. Austria. In: MAISTO, G. (ed.). *Court and Tax treaty Law*. Amsterdam: IBFD, 2007, p. 212; WATTEL – MARRES, c. d., p. 231.

⁵³ PERROT, T. France. In: MAISTO, G. (ed.). *Court and Tax treaty Law*. Amsterdam: IBFD, 2007, p. 240–241.

⁵⁴ Judgment of the Tribunal Supremo of 25 March 2010, STS 1861/2010, resurso no 9020/2005, in Oracle Iberica SRL. *International Tax Law Reports*. 2010, Vol. 13, pp. 164–190.

⁵⁵ Judgment of the Supreme Administrative Court of 25 May 2018, 7 Afs 265/2017-36; judgment of the Supreme Administrative Court of 27 October 2018, 2 Afs 40/2018-58. However, quite often, they do not pay attention to this circumstance, for example, judgment of the Supreme Administrative Court of 13 November 2014, 7 Afs 120/2014-68. Besides, sometimes the commentary versions are no different. MORAWSKI, W. Wykorzystanie Komentarza OECD w procesie wykładni umów o unikaniu podwójnego opodatkowania w orzecznictwie sądów administracyjnych w Republice Czeskiej. *Zeszyty Naukowe Sądownictwa Administracyjnego*. 2022, Vol. 102, No. 4, pp. 167–169.